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October Term, 1958

No. 72

UNITED STATES OF AMERICA,
Appellant,

v.

GEORGE DONALD SHIREY.

Appeal from the United States District Court for the Middle District of Pennsylvania.

MOTION TO AFFIRM.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1957

No.

UNITED STATES OF AMERICA, APPELLANT

v.

GEORGE DONALD SHIREY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM.

OPINION BELOW.

The memorandum opinion of the District Court is set forth in the Appendix, infra, pp. 1a-6a. It is not reported.

STATUTES INVOLVED.

18 U. S. C. 214:

> Whoever pays or offers or promises any money or thing of value, to any person, firm, or corporation in consideration of the use or promise to use any influence to procure any appointive office or place under the United States for any person, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U. S. C. 215:

> Whoever solicits or receives, either as a political contribution, or for personal emolument, any money

or thing of value, in consideration of the promise of support or use of influence in obtaining for any person any appointive office or place under the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

QUESTIONS PRESENTED.

Whether 18 U. S. C. 214 proscribes an offer or promise to a Congressman to donate $1,000 a year to the Republican Party to be used as they see fit, in consideration of the use or promise to use any influence to procure for the offeror the appointive office of Postmaster of York, Pennsylvania.

THE QUESTION IS UNSUBSTANTIAL.

The Order of the Court below dismissing the information lodged against the appellee is proper under the law and the questions on which the decision of this cause depends are so unsubstantial as not to need further argument. For these reasons, as hereinafter amplified, the appellee hereby moves that the Order of the Court below entered March 17, 1958, be affirmed by this Court.

1. The information does not charge an offer or promise of money to a person, or a firm, or a corporation. The offer or promise charged in the information was to donate $1,000 a year to the Republican Party to be used as they see fit. The Republican Party is neither a person, nor a firm, nor a corporation. As stated in the opinion of the Court below (Appendix, infra, p. 5a).

> "A political party has been defined as a body of persons associated for the purpose of promoting certain views, opinions, or principles with respect to government. 29 C. J. S. Political Parties, Paragraph 84. It is in no sense of the word a person, a firm, or a corporation. Had the Congress so intended, it could have added to the words 'person, firm or corporation' the further words 'or political party'."

In enacting 18 U. S. C. 214 the Congress was endeavoring to proscribe certain activities peculiar to political life and its adjunct, patronage. With regard to politics and patronage, the Congress is a uniquely well-informed and sophisticated body. Recognizing the peculiar acumen possessed by the Congress in the political and patronage areas, it can only be concluded that the omission of any reference to political parties or political contributions in 18 U. S. C. 214 was a calculated omission. When the Congress wished to proscribe political contributions it knew well how to do so and did so in 18 U. S. C. 215, the subsection immediately following 18 U. S. C. 214, to be discussed below.

Furthermore, the words "person, firm or corporation" denote specific, limited and definable objects. The Republican Party, on the other hand, is an amorphous entity whose policies and membership are in a constant state of flux. To subsume under the heading of "person" or "firm" or "corporation" the chameleon-like assemblage known as the Republican Party would be to extend and distort the plain meaning of the statute in a way unjustified by logic or common parlance, and would in addition thereto violate the principle that criminal statutes are to be strictly construed. *United States v. Hood*, 343 U. S. 148, 151 (1952). The appellant argues that *United States v. Hood*, supra, rejects a narrow construction of 18 U. S. C. 215. The appellee submits that the *Hood* case accepts a narrow construction of 18 U. S. C. 215, but refuses to "read out what, as a matter of ordinary English speech is in." *United States v. Hood*, 343 U. S. 148, 151 (1952). It is equally true that there should not be read in what as a matter of ordinary English speech is out.

2. The information does not charge an offer or promise of a thing of value to a person, or a firm, or a corporation. The appellant argues at page 3 of its Jurisdictional Statement that because Congressman Stauffer might have his prestige or chance of re-election heightened, that, therefore,

a donation to the Republican Party is a "thing of value" to Congressman Stauffer. This reasoning is unjustified for the following reasons:

a. The information suggests no nexus between the Republican Party and Congressman Stauffer. Indeed, money donated to the Republican Party might be used against the Congressman if he were a Democrat or out of favor with those who at the time control the party funds.

b. The information charges that the offer or promise made was to donate $1,000, i.e., money and does not charge an offer or promise to donate a "thing of value". If something other than money were offered to a person, or a firm, or a corporation, then it must be first ascertained if that other thing comes within the term, a "thing of value". But when money is offered or promised then the examination is reduced to a determination as to whether the money so offered or promised was offered or promised to a person, firm, or corporation. As the appellee has attempted to establish, the Republican Party is neither a person, nor a firm, nor a corporation, and hence the information fails to allege a violation of 18 U. S. C. 214. The offer alleged was an offer of money, it was not an offer of a "thing of value" as distinguished from money. The reasoning of the appellant that although there was an offer of money but not to a person, firm, or corporation, that nevertheless the possibility that a person might gain therefrom changes an offer of money into an offer of a thing of value distorts the simple and clear meaning of the statute and violates the principle of strict construction, as above set forth.

c. Even assuming Congressman Stauffer stood to benefit from a donation to the Republican Party, such

benefit does not constitute a "thing of value". The words "thing of value" follow the word "money". They must be read in connection with the word "money" and so read they do not include within their meaning such highly conjectural and illusory benefits as suggested by the appellant. Furthermore, the appellant would construe "thing of value" from the point of view of an incidental beneficiary. To do so would make the criminal sanctions imposed by 18 U. S. C. 214 dependent not on what the offeror knows or offers, but rather on the day to day personal situation of any person who might incidentally benefit and to whom such benefit might be considered a "thing of value". Under the appellant's theory a contribution to a political party may be criminal on one day because it is a thing of value to a Congressman, and it may not be criminal the next day because the circumstances have so changed so as to preclude its being a benefit to the Congressman on the second day. A criminal statute should not be dependent for its applicability on such vagaries and circumstances wholly beyond the knowledge and scope of the offeror.

If the offer in the instant case were to work hard as a postmaster or to drive Republican voters to the polls on election day, it would by the appellant's definition be no less a thing of value to Congressman Stauffer than the donation of money to the Republican Party, for as a result of either of the above suggested offers or promises the prestige and the possible chance of re-election of the Congressman would conceivably be increased. These illustrations demonstrate the wholly unjustified breadth which the appellant's argument would ascribe to the statutory section in question

and, further, it is submitted, demonstrate the incorrectness of that argument.

3. As stated by the Court below in its opinion set forth in Appendix, infra, p. 4a, "Sections 214 and 215, supra, (referring to 18 U. S. C. paragraph 214 and 18 U. S. C. paragraph 215, respectively) first appear, substantially in pari materia, as a single act, approved December 11, 1926, 44 Stat. 918, H. R. 10739, Public, No. 525, as follows:" A reading of 18 U. S. C. 214 and 18 U. S. C. 215 reveals that the former makes no reference to political parties or political contributions but that the latter specifically refers to political contributions. The appellant, recognizing the significance of this comparision, seeks to minimize its importance by drawing a distinction between the offeror and solicitor. Jurisdictional Statement, page 6. It is submitted that there is no strength in the appellant's argument on this point. The distinction sought to be drawn by the appellant is that the offeror in seeking to purchase a position would always be acting for a specific personal motive and could not claim that what he was doing was for some general good. On the other hand, it is argued by the appellant, the solicitor would be in a position to claim that he was not seeking money for himself but merely engaging in general political activity.

This argument is completely at variance with the appellant's own contention that the offer in this case to the Republican Party is a "thing of value" to Congressman Stauffer. If this were so, why would not a solicitation of a contribution to the Republican Party by Congressman Stauffer be equally a "thing of value" to him. The statute does not permit such inconsistency. If "general good" and "general political activity" are defenses under one section, it is so under the other. Appellee submits, however, that neither section tolerates such defenses. An offer of a political contribution simply is omitted from 18 U. S. C. 214, while a solicitation of such a contribution is proscribed

by 18 U. S. C. 215. The attempt by appellant to draw a subtle distinction between offeror and solicitor thus is subject to two failings, both clearly seen in the facts of this case: (1) if a contribution to a political party is a "thing of value" to a Congressman under 18 U. S. C. 214, it certainly must be so under 18 U. S. C. 215; (2) a defense based on general good or general political activity could arise, if at all, under one section as well as under the other. The status of appellant's argument might thus be characterized as a situation wherein a beautiful theory is murdered by a gang of brutal facts.

Furthermore, appellant's very argument drawn from legislative history makes apparent the self-conscious use of the words "political contribution" in 18 U. S. C. 215 and their omission in 18 U. S. C. 214. If Congress had not devoted itself in its debates to the aspect of political contributions, it might be argued that the omission of political contributions from 18 U. S. C. 214 was not restrictive; but the fact that political contributions were the subject of Congressional debate when the enactment of 18 U. S. C. 214 and 18 U. S. C. 215 was under consideration strengthens the position that the specific proscription of political contributions in 18 U. S. C. 215 and the absence of such proscription in 18 U. S. C. 214 was a conscious act.

There is nothing immoral about a political contribution. Indeed, currently both major political parties are seeking ways and means of expanding the bases from whence to obtain such contributions. The rewarding of the political contributor of high office is today and has always been a prevalent and accepted practice. With this as a background it is submitted that had Congress intended to in a criminal statute proscribe the act alleged in the instant information, it would have done so only by clear verbiage and not by tenuous innuendo. The question is not whether the act alleged is improper, but whether its impropriety has been recognized and outlawed by Congress.

CONCLUSION.

It is respectfully submitted that the Court should affirm the Order of the Court below entered March 17, 1958.

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June, 1958.

Appendix.

APPENDIX.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

No. 12527 CRIMINAL.

UNITED STATES OF AMERICA

v.

GEORGE DONALD SHIREY.

MEMORANDUM.

This is a motion to dismiss the Information because the Information does not state facts sufficient to constitute an offense against the United States of America.

The Information charges that:

> "On or about the 5th day of December, 1953, in the City of York, Middle District of Pennsylvania, and within the jurisdiction of this Court, GEORGE DONALD SHIREY, in violation of the Act of Congress, June 25, 1948, c. 645, Sec. 1, 62 Stat. 694, 18 U. S. C. Sec. 214, did KNOWINGLY, WILFULLY and UNLAWFULLY offer or promise to S. WALTER STAUFFER, a Member of Congress of the 19th Congressional District of Pennsylvania, to donate $1,000 a year to the Republican Party to be used as they see fit, in consideration of the use or the promise to use any influence to procure for him the appointive office, under the United States, of Postmaster of York, Pennsylvania."

As above indicated, this Information was brought under 18 U. S. C. Section 214 which reads as follows:

"Offer to procure appointive public office

"Whoever pays or offers or promises any money or thing of value, to any person, firm, or corporation in consideration of the use or promise to use any influence to procure any appointive office or place under the United States for any person, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

The counterpart to this statute appears in the next section of the Code (18 U. S. C. Section 215) and reads as follows:

"Acceptance or solicitation to obtain appointive public office.

"Whoever solicits or receives, either as political contribution, or for personal emolument, any money or thing of value, in consideration of the promise of support or use of influence in obtaining for any person any appointive office or place under the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

No case construing Section 214 has been brought to our attention, nor has our independent search disclosed any.

In United States v. Hood, et al., 343 U. S. 148 (1952), appellees were indicted for violating 18 U. S. C. Section 215, which, as above indicated, makes it a misdemeanor for anyone to solicit or receive contributions in consideration of the promise of support or use of influence in obtaining for any person "any appointive office or place under the United States." The trial court dismissed certain counts of the indictment which alleged the solicitation of contributions in return for promises to use influence to obtain offices which were not in existence at the time of the solicitation or the return of the indictment but which the President had been authorized to create under the Defense

Production Act of 1950. The order of dismissal was appealed by the Government direct to the Supreme Court under the Criminal Appeals Act, 18 U. S. C. (Supp. IV) Section 3731. The Supreme Court in reversing stated, *inter alia:*

"We think the District Court was wrong. The statute is plainly broad enough on its face to cover the sale of influence in connection with an office which had been authorized by law and which, at the time of the sale, might reasonably be expected to be established. That was the situation here and we do not have to go further to say whether the words will cover the sale of an office which is purely the creature of the seller's fancy.

"The evil at which the statute is directed is the operation of purchased, and thus improper, influence in determining the occupants of federal office. But in attacking that evil, Congress outlawed not the use of such influence, but the solicitation of its purchase, the peddling of the forbidden wares. As is not uncommon in criminal legislation, Congress, in order to strike at the root, made the scope of the statute wider than the immediate evil. Even judges need not be blind to the fact of political life that it helps in influencing political appointments to be forehanded with a recommendation before an office is formally created. Certainly it was not unreal for Congress to believe that the sale of influence in anticipation of jobs was equally damaging to the proper operation of the federal service and to take steps to prevent it. It did so in this Act. Nothing has been suggested, either by the sparse legislative history or by prior judicial construction, to restrain us from giving effect to the obvious, ordinary reading of the statute. It is pressed upon us that criminal statutes are to be strictly construed. But this does not mean that such legislation 'must be construed by some

artificial and conventional rule.' *United States v. Union Supply Co.*, 215 U. S. 50, 55. We should not read such laws so as to put in what is not readily found there. But equally we should not read out what as a matter of ordinary English speech is in.

"This Act penalized corruption. It is no less corrupt to sell an office one may never be able to deliver than to sell one he can. Dealing in futures also discredits the processes of government. There is no indication that this statute punishes delivery of the fruit of the forbidden transaction—it forbids the sale. The sale is what is here alleged. Whether the corrupt transaction would or could ever be performed is immaterial. We find no basis for allowing a breach of warranty to be a defense to corruption."

In the instant case we are not dealing in a sale, rather an attempted purchase.

Sections 214 and 215, supra, first appear, substantially in pari materia, as a single act, approved December 11, 1926, 44 Stat. 918, H. R. 10739, Public, No. 525, as follows:

"An Act To prevent purchase and sale of public office.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That it shall be unlawful to pay or offer or promise to pay any sum of money, or any other thing of value, to any person, firm, or corporation in consideration of the use or promise to use any influence, whatsoever, to procure any appointive office under the Government of the United States for any person whatsoever.

"SEC. 2. It shall be unlawful to solicit or receive from anyone whatsoever, either as a political contribution, or for personal emolument, any sum of money or thing of value, whatsoever, in consideration of the

promise of support, or use of influence, or for the support or influence of the payee, in behalf of the person paying the money, or any other person, in obtaining any appointive office under the Government of the United States.

"SEC. 3. Anyone convicted of violating this Act shall be punished by imprisonment of not more than one year, or by a fine of not more than $1,000, or by both such fine and imprisonment.

"SEC. 4. All Acts and parts of Acts inconsistent herewith are hereby repealed."

This is a criminal statute and with the reservations made in United States v. Hood, supra, must be strictly construed. United States v. Five Gambling Devices, 7 Cir., Slip Opinion February 18, 1953. The construction of a statute should be with reference both to the history of the legislation and to other sections of the law with which it is in pari materia. Gutschalk v. Peck, D. C. N. D. Ohio, 1919, 261 Fed. 212.

As above indicated, Sections 214 and 215 first appeared in 1926 as a single act. The soliciting section (215) specifically mentions "political contribution." No such characterization is found in Section 214 under which this Information is drawn. The Information here alleges that the defendant offered or promised to donate $1,000. a year to the Republican Party. The section in question specifically limits the payee to "any person, firm or corporation." A political party has been defined as a body of persons associated for the purpose of promoting certain views, opinions, or principles with respect to government. 29 C. J. S. Political Parties Section 84. It is in no sense of the word a person, a firm, or a corporation. Had the Congress so desired, or intended it, it could have added to the words, "person, firm or corporation" the further words "or political party."

Having in mind the obvious evil at which both Section 214 and Section 215 are directed, namely, the traffic in federal offices, it is interesting to note that only in Section 215 (solicitation) was Congress concerned about a political contribution. The two sections have stood with no substantial change for nearly thirty-two years. It is not, in my judgment, the province of the courts to attempt to rationalize this apparent deliberate omission.

In the instant case the Information does not charge that the offer was to contribute to the individual named therein, a Congressman; the offer was made to the individual to contribute to the Republican Party. Considering Sections 214 and 215 as a whole, and having in mind the rules or construction above referred to, particularly in the light of the Hood case, supra, it is my conclusion that the Information does not state facts sufficient to constitute an offense against the United States of America.

Motion to dismiss the Information will be granted.

/s/ FREDERICK V. FOLLMER,
United States District Judge.

March 17, 1958.

ORDER.

Now, to wit, March 17, 1958, in accordance with Memorandum this day filed, It is Ordered and Decreed that defendant's motion to dismiss the Information be and the same is hereby granted.

/s/ FREDERICK V. FOLLMER,
United States District Judge.